(8)

No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

N. MARK RALLS
ABELS, LOCKER, RALLS & COHEN
1200 NationsBank Plaza
300 Convent Street
San Antonio, Texas 78205
(210) 224-9991

WALLACE B. JEFFERSON
Counsel of Record
ELLEN B. MITCHELL
CROFTS, CALLAWAY & JEFFERSON
A Professional Corporation
112 East Pecan Street
Suite 800
San Antonio, Texas 78205-1517
(210) 299-0279

Attorneys for Respondent

144695

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

62 pp

QUESTION PRESENTED

Whether a school district that receives federal funds can be held liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, for hostile environment sexual abuse of a student by a teacher when the school district had neither actual nor constructive knowledge of that abuse.

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

United States Constitution Cited:

Other Authorities Cited:

Contents

Respondent Lago Vista Independent School District respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The opinion of the Fifth Circuit is reported at 106 F.3d 1223 (5th Cir.), *cert. granted*, 118 S. Ct. 595 (1997) (No. 96-1866).

PERTINENT STATUTES

1. Title IX.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C.A. § 1681(a) (West 1990) (hereinafter referred to as Title IX).

2. Title VI.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d (West 1994) (hereinafter referred to as Title VI).

3. Title VII.

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

42 U.S.C.A. § 2000e-2(a)(1) (West 1994) (hereinafter referred to as Title VII).

STATEMENT OF THE CASE

A. Statement of Facts.

Alida Star Gebser was a student in the Lago Vista Independent School District in Travis County, Texas. (R. 346.) Lago Vista is a small school district near Austin, Texas with contiguous middle school and high school campuses. (R. 346.) The district receives federal funding for cafeteria food, special-education and drug-free school programs. (R. 372.)

Gebser first entered the district as a seventh grade student. (R. 346.) She was quickly integrated into classes reserved for the gifted and talented. (R. 346.) By the time she reached the eighth grade, she began participating in high-school level academic activities. It was in that context that she first met Frank Waldrop, who led a "great books" discussion group for high school students. (J.A. 51a.) Gebser joined that discussion group while still in the eighth grade because Waldrop and his wife (also a teacher in the district) believed she would advance faster at a higher grade level. (J.A. 51a.) Waldrop's conduct at that time gave no hint of his subsequent abhorrent behavior. (R. 346.)

In the fall of 1991, Gebser enrolled in a social studies class and had Waldrop as her teacher. (R. 347.) Gebser testified that Waldrop treated students as if they were adults, but never made blatantly sexual or otherwise offensive remarks. (R. 347-49.) During Gebser's second semester, Waldrop's interaction with her became increasingly familiar. He flattered her with suggestions that she was more mature than other students; he began to make subtle

remarks — often tied to a literary reference — which were implicitly sexual. (J.A. 53a.) Gebser was not offended by Waldrop's behavior because she appreciated being treated as his "peer." (R. 350.)

Having apparently won Gebser's trust during the first semester, Waldrop exploited the situation in the second. Just prior to spring break of Gebser's freshman year, Waldrop drove to Gebser's home. Finding her alone, Waldrop kissed her, fondled her breasts and genitals, and told her he loved her. (J.A. 54a-55a.) Gebser had no doubt at the time that Waldrop's conduct was wrong. (J.A. 55a-56a.) Even though she knew that Waldrop was scheduled to leave the country immediately on a two-week long school field trip, (R. 351), Gebser did not report the incident to anyone — not to her parents, not to the police, and not to anyone associated with the school district (J.A. 56a.) Her only reason for not discussing the incident with the school's guidance counselor was her "perception" that the counselor was busy with tests and schedules. (R. 355.)

During the period that Waldrop was out of the country, Gebser purposefully rebuffed the inquiries of a concerned teacher who noticed that she seemed "out of sorts." (R. 354-55.) Gebser acknowledged to the teacher that something was "very wrong" but she refused to discuss it. (R. 355.) She made it clear to the teacher that she did not want to talk to *anyone* about what was bothering her and the teacher respected her wishes. (R. 355.) The one person in whom she did confide (a fellow high school student) instructed her to terminate the relationship. (R. 352.) Gebser swore that student to secrecy. (R. 352.) Gebser knew Waldrop's advance was inappropriate and that any such relationship between teacher and student was wrong. (J.A. 55a.) She also knew that if she reported the relationship to school officials, it would end immediately. (J.A. 63a.) She did not report the relationship.

Waldrop's exploitation progressed rapidly after he returned from Europe. He and Gebser began having sexual intercourse in the spring of 1992. (J.A. 59a-60a.) In the beginning their interaction was infrequent, but over the next ten months they began an

increasingly regular pattern of secret, off-campus liaisons. (J.A. 60a-61a.) In order to conceal the relationship from students, faculty, and administrators at Lago Vista, Waldrop and Gebser developed a code for arranging covert sexual encounters off campus. (J.A. 61a.) Gebser agreed to conceal the affair because she knew that she would no longer have Waldrop as a teacher if the relationship were exposed. (J.A. 62a.) She was confused and bewildered because her sexual relationship with Waldrop differed so dramatically from others she had with boys closer to her own age. (R. 360-361.)

Gebser's relationship with Waldrop continued until the two were discovered together in January 1993, at which time Waldrop was arrested. (*See* J.A. 11a, 59a, 83a.) Lago Vista terminated his contract and the Texas Education Agency revoked his license to teach. (R. 377.) From the date of his arrest, he was never again allowed in a Lago Vista classroom. (R. 396.)

None of the sexual activity (or any other physical contact) between Gebser and Waldrop occurred on Lago Vista's property. (J.A. 59a.) Gebser did not inform any teacher or administrator of Waldrop's inappropriate behavior, nor was the relationship known or suspected among the students or staff at Lago Vista. (R. 352-53.)

Although Gebser contends that the district was on notice of Waldrop's "inappropriate sexual approaches" toward other students, the record does not support that assertion. The only prior complaint in the record concerned comments Waldrop supposedly made in the fall of 1992. (J.A. 76a.) In October, the parents of two of Waldrop's students complained to the principal that Waldrop had made inappropriate remarks in class. (J.A. 77a.) Those remarks included the observation that some of the girls had "filled out" over the summer and an obscure reference to the size of some of the boys' belt buckles. (J.A. 77a.) The principal, Michael Riggs, promptly investigated the complaint and set up a meeting between Waldrop and the parents. (J.A. 78a.) Waldrop stated at that meeting

that he had not meant to offend anyone but apologized if he had. (R. 393.) At the end of the conference, it appeared to Riggs that the parents were satisfied and the situation had been resolved. (R. 395.) He did not believe that Waldrop would make any further inappropriate remarks and, to be sure, he admonished Waldrop to be more careful about his comments in the future. (J.A. 80a.) Riggs did not receive any further complaints.[1]

During at least a portion of the period in which Waldrop was engaging in sexual conduct with Gebser, Lago Vista had in place written policies prohibiting any employee from sexually harassing a student. (J.A. 43a-47a.) "Sexual harassment" was defined as including:

> such activities as engaging in sexually oriented conversations, telephoning students at home or elsewhere to solicit unwelcome social relationships, physical contact that would reasonably be construed as sexual in nature, and threatening or enticing students to engage in sexual behavior in exchange for grades or other school-related benefit.

(J.A. 46a.) Another policy, in place from at least 1989 through 1993, more generally prohibited school district employees from engaging in any sexual harassment, whether of a student or fellow employee. (R. 380, 415, 419.)

Moreover, at the time of the events here at issue, Lago Vista had a written complaint policy that provided that "[a] student or parent who has a complaint alleging sexual harassment or offensive intimidating conduct of a sexual nature may request a conference with the principal or designee." (J.A. 46a.) The principal or designee was then required to hold a conference within five days and to coordinate an investigation which was to be completed within ten

1. There was also no flood of complaints after Waldrop's relationship with Gebser was revealed. (R. 376.) The district followed up on the few reports that were made and found nothing of concern. (R. 376.)

days. (J.A. 46a.) This procedure was not followed in the present case because neither Gebser nor her parents made any complaint about Waldrop's conduct.[2] (R. 380.)

In addition to these policies, every teacher in the district was (and is) governed by an ethical code of conduct, which requires professional educators to make reasonable efforts to protect students from conditions detrimental to the physical or mental health and safety of the students. (R. 374.) That requirement stands as an absolute bar to the sort of abuse inflicted upon Gebser by Waldrop. No school with notice of such a relationship would tolerate it. Had Lago Vista actually been apprised of the abuse, it would have investigated immediately, suspended Waldrop and, ultimately, terminated his contract. (R. 381.) As noted above, however, Waldrop and Gebser managed to conceal the relationship until January of 1993. (R. 381.)

B. Proceedings Below.

The United States District Court for the Western District of Texas rejected Gebser's contention that Lago Vista should be held strictly liable for Waldrop's conduct because such a holding would not further Title IX's purpose of countering *policies* of discrimination in federally funded education programs. (R. 544-45.) The court concluded instead that:

> to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff.

2. Gebser's parents did not condone Waldrop's conduct; they were simply unaware of it because Gebser concealed the relationship from them, as well as from school officials. (R. 382.)

(R. 545.) Because there is no evidence in the present case that Lago Vista had actual or constructive notice of Waldrop's sexually discriminatory behavior, the court granted Lago Vista's motion for summary judgment on Gebser's Title IX claim.[3] (R. 547.)

The United States Court of Appeals for the Fifth Circuit affirmed the order of the district court in accordance with its recent opinions in *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997). The court reiterated its position that Title IX does not impose strict liability on a school district for sexual harassment of a student by a teacher. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997). It also rejected a theory of common-law agency, noting that such a theory "would generate vicarious liability in virtually every case of teacher-student harassment." *Id.* at 1226. The court concluded, as it had in *Rosa H.*, that:

> school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Id. There is no evidence in this case that any employee of Lago Vista with supervisory power over Waldrop (or any employee at all) had actual knowledge of his abuse of Gebser.

SUMMARY OF THE ARGUMENT

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court recognized an implied private cause of action under Title

3. The district court also granted summary judgment on Gebser's claims for negligence and violation of § 1983, but Gebser appealed only from the ruling denying her Title IX claim.

IX. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), it recognized a remedy in damages for an intentional violation of that statute. In neither case did the Court address the standard by which a school district may be held liable under Title IX when a teacher sexually harasses a student. Lago Vista proposes that the only appropriate standard that may be applied in these circumstances is one requiring actual knowledge of a substantial risk of sexual harassment on the part of a school official who was invested by the school board with the duty to supervise the offending employee and the power to take action to end the abuse and who failed to take appropriate remedial action.

An actual knowledge standard is required because the language and history of Title IX reveal that Congress intended that it be interpreted in the same manner as Title VI. Both Title VI and Title IX are Spending Clause legislation, which limits the circumstances under which a recipient of federal funds may be held liable for damages. Specifically, a recipient of federal funds must be given clear notice of the consequences of accepting those funds, including clear notice of the circumstances in which it may be exposed to monetary liability. As previously recognized by the Court in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), liability for damages may only be imposed under Title VI for an intentional violation of the statute. School districts accepting federal funds after the date of that opinion were entitled to expect that the same limitation would apply to Title IX. Nothing in the statute, its implementing regulations, or its interpretation by the Department of Education gave any notice to the contrary. The fact that the Department of Education, through its Office for Civil Rights, has now issued a Guidance purporting to define Title IX standards of liability is of no moment. That Guidance, even if it were entitled to any deference, was issued four years after the events here at issue and cannot be given retroactive effect.

Title IX's similarity to Title VI and its Spending Clause roots are central to a complete analysis of the question presented to this Court and are discussed in detail below. Gebser, however, has failed

to confront these issues; she makes no mention at all of Title VI and relegates her abridged discussion of the Spending Clause to two footnotes. *See* Brief for Petitioners at 19 n.10 & 24 n.15. She relies, instead, on an application of Title VII standards and principles of agency law. This reliance is unfounded.

The language and source of Title VII are significantly different than Title IX. For instance, Title VII explicitly refers to "agents," while Title IX does not; Title VII contains an elaborate enforcement mechanism, while Title IX does not; Title VII contains explicit limitations on potential damage awards, while Title IX does not. Most importantly, Title VII is not Spending Clause legislation and is not subject to the limitation that damages may be imposed only for an intentional violation.

Agency principles, as applied by Gebser, would result in strict liability for school districts. Gebser concludes that a teacher is "aided by the agency relationship" in engaging in sexual harassment by mere proximity and access to a student. Adopting such a standard would defeat the purpose of Title IX by inducing school districts to decline federal funds rather than face devastating financial consequence for concealed acts of sexual exploitation.

It is important to bear in mind that the question in this case is not whether school districts are somehow "responsible" for violations of Title IX and for failure to comply with administrative procedures. The issue is in what circumstances a school district may be compelled to answer *in damages* for a violation of Title IX or its implementing regulations. The answer to this question requires careful consideration of the practical impact each proposed standard of liability will have on the goals of Title IX and on the ability of school districts to perform their educational function. The only standard that will allow school districts to concentrate their time, efforts, and resources on education and will not either impose an oppressive financial burden or cause school districts to completely withdraw from federal programs is the standard proposed by Lago Vista — actual knowledge.

Finally, shortly after the Court recognized an implied private cause of action under Title IX, it reinterpreted the *Cort v. Ash*[4] factors previously used to determine when a private cause of action is implicit in a statute. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979). It embraced a "stricter standard for the implication of private causes of action" and declared that the "ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578. It may be "too late in the day" to reconsider the Court's holdings in *Cannon* and *Franklin*, *see* 503 U.S. at 77 (Scalia, J., concurring in judgment), but it is not too late to refine those holdings to remove from educational institutions receiving federal funds the onerous burden of potential financial ruin arising from conduct it did not know about and could not have stopped.

ARGUMENT

I. GEBSER'S RELIANCE ON TITLE VII IS MISPLACED; TITLE VI IS THE MOST APPROPRIATE ANALOGUE TO TITLE IX.

Much of Gebser's argument rests on the assumption that the interpretation of Title IX should be governed by Title VII principles.[5] Indeed, she states that the comparison between these two statutes is "crucial." Brief for Petitioners at 11. An examination of the language, history, and source of Title IX, however, reveals that the more proper comparison is with Title VI, not Title VII.

---

4. 422 U.S. 66 (1975).

5. The principles governing Title VII are not clear. The question of defining the standard of liability for an employer when a supervisor sexually harasses a subordinate employee is currently pending before this Court. *See Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997).

A. Congress explicitly patterned Title IX after Title VI.

This Court has repeatedly recognized that Congress patterned Title IX after Title VI. *Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 514 (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). This is evident both in the language of the statutes and in the legislative history of Title IX.

1. The language of the statutes.

a. The applicability of Titles VI and IX is contingent on receipt of federal funds; the applicability of Title VII is not.

The language of Title IX is nearly identical to the language of Title VI. Title IX states, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C.A. § 1681(a) (West 1990). Similarly, Title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d (West 1994).

The only differences between the language of Title IX and the language of Title VI are: (1) Title IX applies to discrimination on the basis of sex, while Title VI applies to discrimination on the

ground of race, color, or national origin; and (2) Title IX applies only to education programs or activities receiving federal funds, while Title VI applies to any program or activity receiving federal funds.

The language of Title VII is unlike either Title VI or Title IX. Title VII states, in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

The quoted portion of Title VII differs from both Title VI and Title IX in many respects. For purposes of this case, the most significant distinction is that the application of Title VII is not contingent on the receipt of federal funds. Rather, that statute unconditionally prohibits discrimination in employment; employers are not given any option but to comply. The prohibition contained in Titles VI and IX, however, applies only to recipients of federal funds. As discussed below, potential fund recipients are given the option to decline federal financial assistance and thereby avoid the conditions imposed by Titles VI and IX.

Gebser argues that the language of Title IX (and, by implication, Title VI) does not prohibit discrimination *by* recipients of federal funds. Rather, it prohibits any discrimination *under* a federally-funded program or activity, regardless of whether the fund recipient actually participates in or knows about the discrimination.

Gebser contends that this difference between Title IX and Title VII leads to the conclusion that Title IX must impose *broader*

responsibilities on school districts than Title VII imposes on employers. She first asserts that Title VII simply prohibits discrimination by employers while Title IX "creates an affirmative duty on the part of recipients of federal funds to insure a school environment free of discrimination." Brief for Petitioners at 16. From this, she concludes that school districts are "responsible" for violations of Title IX occurring under any federally funded educational program or activity, whether or not the district "caused" the discrimination. Gebser's argument reaches too far.

Regardless of the merits of Gebser's argument that Title IX requires recipients of federal funds to "guarantee" that there will be no discrimination in their educational programs — which is, of course, an impossible burden and one that Congress could not have intended — the contention that the fund recipient is "responsible" for violations of the statute does not necessarily mean that it is liable to respond *in damages*. If hostile environment discrimination is occurring in one of the district's educational programs or activities, even without any knowledge on the part of the district, the district could certainly be held "responsible" in the sense that it could be ordered to remedy the situation by firing the offending teacher, adopting new policies, enforcing existing policies, or taking other appropriate remedial action. But the availability of such injunctive relief does not necessarily translate into the availability of a remedy in damages.

In sum, the manner in which Title IX is phrased simply determines that a violation of the statute may occur whenever a person is discriminated against on the basis of sex, regardless of the school district's knowledge of the discrimination. But nothing in the language of the statute indicates that a school district must respond in damages for every such violation, regardless of its own knowledge or culpability.

b. Title VII makes specific reference to agency principles; Title IX does not.

As noted above, Title VII applies to an "employer" regardless of whether the employer is a recipient of federal funds. The statute specifically defines "employer" as including any "agent" of the employer. 42 U.S.C.A. § 2000e(b) (West 1994). Title IX, on the other hand, defines the relevant entity — the education program or activity receiving federal funds — as "all of the operations of . . . a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system; . . ." 20 U.S.C.A. § 1687(2)(B) (West Supp. 1997). "Local educational agency" is defined, in turn, as

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

20 U.S.C.A. § 8801(18)(A) (West Supp. Pamphlet 1997). The phrase includes any other public institution or agency having administrative control and direction of a public elementary or secondary school. 20 U.S.C.A. § 8801(18)(B) (West Supp. Pamphlet 1997). No reference is made to "agents."

Again, Gebser argues that this difference in language means that school districts shoulder broader responsibilities under Title IX than those imposed on employers under Title VII. Gebser urges that Title VII's express reference to "agents" acts as a limitation on the scope of employer liability. She relies for this proposition on *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), in which the Court stated:

> Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Id. at 72 (citation omitted).

Interpreting the above-quoted language to support a broader standard of liability under Title IX is flawed in two respects. First, the Court's statement in *Meritor* is

> but another way of stating the obvious; that is, when applying agency principles in the context of Title VII, an employer may only be held liable for the sexually harassing conduct of an employee who acts within the scope of his or her employment.

Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1037 (7th Cir. 1997) (Coffey, J., concurring).

Second, the Court in *Meritor* held that, because of the use of the term "agents," the absence of notice does not necessarily insulate an employer from liability. Applying Gebser's reasoning, the *absence* of the term "agents" from Title IX would lead to the conclusion that educational institutions are *not* liable in the absence of notice of sexual harassment. *Id.* Gebser does not confront this analysis because it is not in keeping with her assertion that the lack of reference to "agents" in Title IX somehow creates *broader* liability under that statute than under Title VII.

Finally, despite Gebser's assertion to the contrary, the *Meritor* court was not "rejecting a broad imputation of vicarious employer liability for discrimination by any supervisor and other employees." Brief for Petitioners at 16-17. In fact, only the liability of a supervisor was at issue in that case; there was no intimation of discrimination by any "other employees." The Court was not considering whether an employer is vicariously liable for discrimination committed by employees of any level, but whether the mere fact that a perpetrator is a supervisor is sufficient to impose liability on the employer. It was in that context that the Court concluded that "Congress wanted courts to look to agency principles for guidance" in determining employer liability under Title VII. *Meritor*, 477 U.S. at 72. The failure to include a similar reference to "agents" in Title IX simply means that Congress did not express a desire in that statute to have the courts look to agency principles to determine liability. It cannot be construed to mean that Congress intended that recipients of federal funds be vicariously liable under Title IX for any discriminatory conduct by any employee.

c. Title VII contains elaborate provisions for imposing and limiting monetary liability; Title IX does not.

Title VII and Title IX also differ in that Title VII provides a specific mechanism for redress of violations whereas Title IX provides only for termination of federal funds.[6] Compare 42 U.S.C.A. § 2000e-5 (West 1994) and 20 U.S.C.A. § 1682 (West 1990). This distinction has not gone unnoticed:

> Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal-court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available

6. Title IX regulations specifically adopt and incorporate the procedural provisions applicable to Title VI. 34 C.F.R. § 106.71.

> unless discriminatory conduct falls within one of several exceptions. This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination. . . . And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.

North Haven Bd. of Ed., 456 U.S. at 1934 (Powell, J., dissenting, joined by Burger, C.J. and Rehnquist, J.).

Title VII also is supplemented by detailed regulations that assist employers to avoid illegal employment practices. *Rosa H.*, 106 F.3d at 657 (citing 29 C.F.R. Pts. 1600-1691). In contrast, the regulations promulgated under Title IX do not address sexual harassment at all. Id. (citing 34 C.F.R. §§ 106.1-106.71 and 34 C.F.R. §§ 100.6-100.11). Most significant, however, is the fact that, unlike Title IX, Title VII "establishes limits on liability to ensure that private actions against employers do not become excessive." *Rosa H.*, 106 F.3d at 656 (citing 42 U.S.C. § 1981a). Without these procedural safeguards in place, it is incomprehensible that Congress intended, or that school districts were adequately informed, that in return for limited federal funding, school districts would be exposed to unlimited liability in damages for conduct of which they had no knowledge.

2. Legislative history of Title IX.

It is also apparent from the legislative history of Title IX that Congress intended for that statute to be construed in accordance with Title VI. *See Cannon*, 441 U.S. at 694-701; *North Haven Bd. of Ed.*, 456 U.S. at 546 (Powell, J., dissenting). For example, Senator Birch Bayh, the Senate sponsor of Title IX, repeatedly and specifically connected Title IX and Title VI: "This is identical language, specifically taken from title VI of the 1964 Civil Rights Act. . . ." 117 Cong. Rec. 30407 (1971); "We are only adding the 3-letter word 'sex' to existing law." *Id.* at 30408;

> The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX].

Id.; "[E]nforcement of [Title IX] will draw heavily on [Civil Rights Act of 1964] precedents." 118 Cong. Rec. 18437 (1972). The expectation of Congress in passing Title IX was that it would be construed and applied in the same manner as Title VI.

The few references to Title VII that are contained in the legislative history of Title IX do not support the conclusion that Congress intended for Title IX to be construed like Title VII rather than Title VI. For example, the House Report states:

> One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964. . . . Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.

H.R. Rep. No. 554, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2462, 2512. Such references, however, do not negate the overwhelming connection, in language, history, and source, between Title IX and Title VI. At most, one might argue that they support applying Title VII principles to Title IX claims arising in the context of *employment* discrimination. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (application of Title VII standard to Title IX sex discrimination is limited to context of employment discrimination). Because sexual harassment of a student by a teacher does not involve employment discrimination, the legislative history of Title IX does not support the application of Title VII principles in this case.

Finally, it should be noted that Title IX's legislative history is of limited assistance in determining the appropriate standard of liability when a teacher sexually harasses a student. It is apparent from the legislative history that this is not the type of discrimination that was envisioned by Congress at the time Title IX was enacted. There are repeated references to discrimination in admissions, scholarships, availability of services, and employment, *see, e.g.*, 118 Cong. Rec. 5803, 5812 (1972), but no discussion at all of sexual harassment. The Court should be wary of imposing an expansive standard of liability for conduct that Congress did not even contemplate. Indeed, this circumstance supports imposition of the standard of liability most narrowly suited to fulfill the congressional purpose in enacting Title IX — a standard requiring actual knowledge.

B. Title IX and Title VI are Spending Clause legislation; Title VII is not.

Title VII was enacted pursuant to Congress' power under the Commerce Clause and section 5 of the Fourteenth Amendment. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 367 (1978). Title VI, however, was enacted pursuant to Congress' spending power. *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 598-99 (1983); *see* U.S. Const. Art. I, § 8, cl. 1.

The Court in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), declined to address whether Title IX was enacted solely pursuant to Congress' Spending Clause powers or also pursuant to section 5 of the Fourteenth Amendment. It was not necessary to reach this issue in *Franklin* because the Court held that "a money damages remedy is available under Title IX for an *intentional* violation irrespective of the constitutional source of Congress' power to enact the statute. . . ." *Id.* at 75 n.8 (emphasis added). The issue is ripe for decision in this case, though, because there is no evidence that Lago Vista committed an intentional violation of Title IX. Thus, a determination that Title IX was enacted pursuant to the Spending Clause is dispositive of this case.

Title IX *is* Spending Clause legislation. Several factors point to this conclusion. First, as noted above, Title VI has been held to be Spending Clause legislation and the language of Title IX and Title VI is nearly identical. Second, Title IX regulates purely private educational institutions that receive federal funds. If Congress had acted under its Fourteenth Amendment enforcement power, the reach of Title IX would be limited to state actors, *i.e.*, institutions that receive state funds. *See Davis v. Monroe County Bd. of Ed.*, 120 F.3d 1390, 1398 n.12 (11th Cir. 1997), *petition for cert. filed* 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843); *Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1012 n.14 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). Third, the legislative history of Title IX demonstrates that Congress intended that statute to be a "typical 'contractual' spending-power provision." *Davis*, 120 F.3d at 1398.[7]

---

7. The *Davis* court cited the following excerpts from Title IX's legislative history:

> Representative Green put it succinctly: "If we are writing the law, I would say that any institution could be all men or all women, but my feeling is that they do it with their own funds and not taxpayers' funds." *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, H.R. 5193, and H.R. 7248 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 92nd Cong., 1st Sess. 581 (1971). Representative Green also quoted with approval President Nixon, who had stated, "Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people. 117 Cong. Rec. at 39,257 (1971) (statement of Rep. Green). To Senator Bayh, the reach of Title IX was clearly restricted to federally funded institutions. *See* 118 Cong. Rec. at 5812. In support of Title IX, Senator McGovern stated, 'I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination." 117 Cong. Rec. at 30,158.

120 F.3d at 1398.

Finally, the Court has previously held that because legislation enacted pursuant to Congress' power to enforce the guarantees of the Fourteenth Amendment imposes congressional policy on States involuntarily and often intrudes on traditional state authority, the courts "should not quickly attribute to Congress an unstated intent to act under [this] authority." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *see also City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997) (congressional enforcement power is not unlimited). There is nothing in Title IX that indicates a congressional intent to enforce the Fourteenth Amendment; its language and structure lead to the conclusion that it is Spending Clause legislation. *Rowinsky*, 80 F.3d at 1012 n.14. "Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States." *Id.* (quoting *Pennhurst*, 451 U.S. at 18).

Title IX is not a regulatory measure; it is an exercise of Congress' power to "fix the terms on which Federal funds shall be disbursed." *See Guardians Ass'n*, 463 U.S. at 599 (quoting *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143 (1947)). As such, its interpretation, like that of Title VI, must be governed by limitations repeatedly and expressly recognized by this Court in construing Spending Clause legislation. The fact that these limitations do not apply to Title VII further supports Lago Vista's position that Title VI, not Title VII, is the most appropriate analogue to Title IX.

C. Policy considerations are relevant only insofar as they comport with a statute's limitations.

Gebser contends that Title IX must be construed more broadly than Title VII because of differences between the workplace and the school. Her argument is, essentially: (1) that school children require more protection because of their vulnerability; and (2) that schools should be liable in damages if they fail to provide that protection because schools act *in loco parentis*. Brief of Petitioners at 19-24. Lago Vista does not dispute that children, especially

young children, are more vulnerable than are adult employees. This vulnerability, however, is not peculiar to the school setting; children are vulnerable in nearly every facet of their lives simply because they are children. Society at large surely has a moral obligation to nurture and protect children. Legislators, state and federal, may enact versions of that obligation into law. It is a simple fact, however, that Title IX does not say that school districts who opt to receive federal funds are liable for harassment without regard to fault. Moral obligations do not become *legal* obligations in the absence of state or federal legislation. And, as explained *infra*, there is good reason to doubt that a strict liability scheme judicially imported into Title IX would achieve the desired result of protecting children; a more likely result would be the rejection of federal funding — and the consequent nullification of Title IX — in state education.[8]

Congress did not choose to pattern Title IX after Title VII, nor did it enact Title IX pursuant to its Fourteenth Amendment enforcement power. Rather, it enacted Title IX pursuant to its spending power. Any interpretation or application of Title IX must take into account the limitations proscribed by its source and, for reasons set forth below, those limitations preclude adopting Gebser's proposed standards of liability. Insofar as Gebser disputes the wisdom of the legislature's course of action on the issue of sexual discrimination in the schools, her concerns should be addressed to Congress or to the states, not this Court. *See North Haven Bd. of Ed.*, 456 U.S. 512 at 536 n.26 ("These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even were we to disagree with the legislative choice.")

---

8. There is also reason to question whether it is morally acceptable to force a party to assume liability for the criminal conduct of another when that party neither knows nor has reason to suspect that the conduct is occurring.

II. AS UNDER TITLE VI, LIABILITY FOR DAMAGES CAN BE IMPOSED UNDER TITLE IX ONLY FOR AN INTENTIONAL VIOLATION OF THE ACT.

A. Title IX's Spending Clause origin limits the possible standards of liability.

The significance of Title IX's Spending Clause origin cannot be understated. As explained in *Pennhurst*:

> Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (citations omitted).

The crucial inquiry is not whether a fund recipient would knowingly undertake the obligations imposed, but whether Congress spoke so clearly that it can fairly be said that the recipient could make an informed choice. *Id.* at 25. "Though Congress' power to legislate under the spending power is broad, it does not

include surprising participating States with post acceptance or 'retroactive' conditions." *Id.*

"As a statute enacted under the Spending Clause, Title IX should not generate liability unless the recipient of federal funds agreed to assume the liability." *Rosa H.*, 106 F.3d at 654. Thus, in determining a school district's standard of liability under Title IX for a teacher's sexual abuse of a student, this Court must consider what standard school districts, as voluntary recipients of federal funds, could reasonably have anticipated. This inquiry is made more difficult, of course, by the fact that Congress not only did not expressly state a standard of liability for violations of Title IX, it did not expressly incorporate *any* private cause of action into Title IX. In such a case it is especially important to "respect the [limitations] applicable in Spending Clause cases and take care in defining the limits of [a] cause of action and the remedies available thereunder." *Guardians Ass'n*, 463 U.S. at 597.

Finally, it must be stressed that school districts receiving federal funds have a choice between accepting those funds and subjecting themselves to whatever standard of liability the Court adopts, or declining federal funds and freeing itself of the conditions imposed under Title IX. *See Grove City College*, 465 U.S. at 575 (educational institution may terminate federal funds and avoid Title IX requirements); *Guardians Ass'n*, 463 U.S. at 596-97 (discussing choices available to recipients of federal funds).

B. Congress implicitly conveyed that Title IX would be governed by Title VI standards.

Although Congress did not explicitly articulate the standards that would govern private causes of action under Title IX, it did not leave the courts wholly without guidance nor did it leave fund recipients wholly without notice. As discussed above, the language, history, and source of Title IX convey that it is to be governed by Title VI standards. In 1983, this Court recognized in *Guardians* that a monetary remedy can be imposed under Title VI only for an

intentional violation of that statute.[9] At least since that time, school districts have accepted federal funds with the expectation that they would be exposed to monetary liability only for intentional violations of Title IX. This understanding was reinforced by the Court's opinion in *Franklin*, which recognized that money damages are not available for an unintentional violation of Spending Clause legislation because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." 503 U.S. at 74. This principle was in no way diminished by other statements made in *Franklin* nor did that opinion give school districts notice that they could be liable in damages for anything but an intentional violation of Title IX.

C. Gebser reads too much into *Franklin*.

Gebser places great emphasis on the following language from the Court's opinion in *Franklin*:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

503 U.S. at 75.

---

9. Despite the fractured opinions in *Guardians*, it is apparent that a majority of the Court would not permit a damage remedy for an unintentional violation of Title VI. *See* 463 U.S. at 607 n.27. Even Gebser acknowledges that "damages may not be recoverable against funded entities under Spending Clause legislation for unintentional discrimination." Brief for Petitioners at 19 n.10.

Gebser asserts that this language forecloses the argument that Title IX's Spending Clause roots mandate an actual notice standard of liability. She reads this passage as establishing that "sexual harassment by a teacher, when attributable to the school district, fulfills the Spending Clause requirement of intentional discrimination and justifies the imposition of damages." Brief for Petitioners at 19 n.10. Gebser then asserts that, because of the Court's citation to *Meritor*, a teacher's sexual harassment is attributable to the school district under the standards applicable to Title VII and/or under general agency principles.

Contrary to Gebser's expansive interpretation of the language quoted above, the Franklin Court did no more than acknowledge that sexual harassment or abuse of a student by a teacher can constitute sexual discrimination under Title IX. This conclusion is supported by examining the context of the Court's original statement in *Meritor*. The question under discussion in that case was whether "unwelcome sexual advances that create an offensive or hostile working environment violate Title VII." 477 U.S. at 64. The statement, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex," was nothing more than an affirmative answer to that question. Thus, the *Franklin* Court's citation to *Meritor* simply directs courts to look to Title VII principles to determine what constitutes sexual harassment, *i.e.*, whether conduct is severe and pervasive enough to constitute illegal discrimination. *See Smith*, 128 F.3d at 1024. It accomplishes nothing more.

Because the Court in *Franklin* was not addressing the appropriate standard of liability for school districts when a teacher sexually harasses a student, the above-quoted language cannot be read to foreclose a requirement of actual knowledge on the part of the school district nor can it be read to mean that any sexual harassment by a teacher is considered an intentional violation of Title IX.

> *Franklin's* single citation to *Meritor Savings* to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context. We can find nothing in *Franklin* to support the . . . theory that Title IX can make school districts liable for monetary damages when the district itself engages in no intentional discrimination. There is nothing to suggest that Congress intended such a sweeping liability. More to the point, there is nothing to give notice to the recipient of federal funds that the funds carry the strings of such liability.

Rosa H., 106 F.3d at 656. Certainly the mere citation to *Meritor* cannot support the proposition that a teacher's secret illicit conduct is automatically imputed to the school district simply because of the teacher's position as a teacher.

Gebser also fails to appreciate a crucial difference between the facts in *Franklin* and the facts in the present case — the school district in *Franklin* had actual knowledge of the abuse and, not only did it fail to take remedial action, it discouraged the student from pressing charges against the offending teacher. *See* 503 U.S. at 63-64. Lago Vista, on the other hand, had no knowledge of Waldrop's abuse and no opportunity to remedy the situation. Gebser attempts to minimize this distinction by stating that "the Court [in *Franklin*] made no reference to those facts [actual knowledge] in its analysis of the Spending Clause objection to damages." Brief for Petitioners at 19 n.10. But certainly the existence of actual knowledge, which was expressly noted in the opinion, was significant to the Court's declaration that the case involved *intentional* discrimination. *See* 503 U.S. at 63, 74-75. Thus, the most that can be gleaned from the *Franklin* opinion regarding a school district's standard of liability under Title IX is that a school district may be liable for damages if it had actual knowledge of a teacher's sexual abuse of a student and failed to take remedial action. *See Smith*, 128 F.3d at 1022 (institutional liability in *Franklin* rested on institution's actions; Court did not address standard for

institutional liability based on teacher's action). This is not inconsistent with the approach taken by the Fifth Circuit in the present case.

III. GEBSER'S PROPOSED STANDARDS OF LIABILITY ARE NOT AVAILABLE FOR VIOLATIONS OF SPENDING CLAUSE LEGISLATION; ONLY AN ACTUAL KNOWLEDGE STANDARD OF LIABILITY IS APPROPRIATE UNDER TITLE IX.

Gebser proposes two alternate standards of liability — a modified constructive notice standard and an agency standard. Neither of these standards limits a school district's liability for damages to intentional violations of Title IX. Thus, neither standard comports with school districts' Title IX contract with the federal government. The only appropriate standard is actual knowledge.

A. Modified constructive notice.

The first standard proposed by Gebser would cause a school district to answer in damages if it knew or should have known of a teacher's sexual harassment of a student or if the district did not afford students a reasonable avenue for complaint and redress. This standard encompasses three possible bases for liability: (1) actual knowledge; (2) constructive knowledge; and (3) failure to provide a reasonable avenue for complaint and redress.

1. Actual knowledge.

a. The actual knowledge standard comports with the requirement of an intentional violation.

Lago Vista agrees that actual knowledge is the appropriate standard of liability in the circumstances of this case; it disagrees that any other proposed standard may apply. Actual knowledge is required before damages may be assessed against the school district because, in accordance with Title IX's Spending Clause roots, only

an intentional violation by the recipient of the federal funds will support such a damage award. Because this is the standard that applies to Title VI, school districts, knowing that Title IX was patterned after Title VI, were entitled to expect that the same standard would apply in this context. Certainly, if Congress had intended that any other standard apply, it failed to articulate that standard with a clear voice. Simply put, only an actual knowledge standard of liability is part of the Title IX contract.

b. The school district need only have actual knowledge of a substantial risk of sexual harassment.

Gebser overstates the Fifth Circuit's holding by implying that that court would require actual knowledge of the specific abuse that is occurring. The basis of the court's holding in the present case was its prior holding in *Rosa H.* In that case, the court explained:

> Students need not show that the district knew that a particular teacher would abuse a particular student; the plaintiff could prevail in this case, for example, by establishing that the school district failed to act even though it knew that Contreras posed a substantial risk of harassing students in general. But Title IX liability for sexual harassment will not lie if a student fails to demonstrate that the school district actually knew that the students faced a substantial threat of sexual harassment.

106 F.3d at 659. Thus, actual knowledge of a substantial threat or risk is sufficient.

c. Actual knowledge must be possessed by one with the power to remedy the situation.

Gebser also overstates the significance of the Fifth Circuit's holding concerning who must have actual knowledge. That court did not identify the persons who must have knowledge by reference

to any particular job title, but by reference to their ability to act for the district to prevent or remedy the threat of sexual harassment. Again, *Rosa H.* is instructive:

> Whether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge.

106 F.3d at 660.

Recognizing that a school district can be liable in damages only for an intentional violation of Title IX, the Fifth Circuit's answer to this question is entirely reasonable. A school district cannot be said to have *intentionally* discriminated unless it had actual knowledge and failed to take appropriate remedial action. Unless the requisite knowledge is possessed by someone with the power and authority to take remedial action, the failure to take such action is not intentional.

Gebser appears to view the Fifth Circuit's position on this issue as unduly restrictive. It is not, however, the most restrictive reading of Title IX that has been adopted on this issue. For example, in *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 (11th Cir. Jan. 20, 1998), the Eleventh Circuit agreed with the Fifth Circuit: (1) that a school district is not liable under Title IX based on respondeat superior or other variants of agency law; and (2) that the district is liable only if it had actual notice of sexual harassment and then failed to act. *Id.* at *2. The *Floyd* court disagreed, however, that notice can be imputed to a school district if a supervisor with authority to take action to end the abuse has knowledge of the harassment. *Id.* Instead, the court looked at the statute and regulations, including the definition of "local educational agency" contained in 20 U.S.C. § 8801, and concluded that it must refer to state law to determine who is responsible for the administrative control or direction of the school district. *Id.* After an examination

of Georgia law, the court held, "For [Title IX] liability in Georgia, *the superintendent or the board* must have actual knowledge of the sexual harassment and then fail to take reasonable steps to end the abuse." *Id.* at *4 (emphasis added). This approach, which is more restrictive than that taken by the Fifth Circuit, illustrates that the standard of liability articulated in *Rosa H.* does not delineate the outer fringe of possible standards but represents an appropriate balancing of the needs of students *and* school districts in light of the language, history, purpose, and limitations of Title IX.

d. An actual knowledge standard will not encourage school districts to ignore the dangers of sexual harassment.

Gebser contends that adopting an actual knowledge standard of liability will encourage school districts to actively avoid learning of problems or potential problems concerning teacher harassment of students. Not only is this contention pure speculation, it is not supported by reason or logic. Aside from the moral implications of turning a blind eye to sexual harassment of students, public school districts and their supervisory personnel could face liability under 42 U.S.C. § 1983 for such a policy of deliberate indifference to the welfare of their students. *See Doe v. Claiborne County*, 103 F.3d 495, 506 (6th Cir. 1996) (sexual abuse by teacher is violation of due process); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (§ 1983 liability for deliberate indifference to sexual harassment of student); *Lipsett*, 864 F.2d at 901-902 (§ 1983 liability of supervisory officials for sexual harassment). Similarly, private educational institutions and their supervisory personnel could face liability under state tort law. There is no reason to believe that imposing an actual knowledge standard of liability under Title IX will significantly impact a school district's incentive to prevent sexual harassment of its students. But as discussed elsewhere in this brief, there is reason to believe that imposing any *other* standard of liability would give a school district incentive to decline federal funds and remove itself completely from the dictates of Title IX.

e. The OCR Guidance does not support imposing a more onerous standard of liability.

Gebser relies heavily on a recent Guidance issued by the Office of Civil Rights (OCR) to support her proposed standards of liability. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997). This reliance indicates her recognition that Title IX itself does not adequately notify school districts that accepting federal funds could expose them to unlimited monetary liability for conduct of which they have no notice. OCR's interpretation of Title IX is not, however, a sufficient basis for imposition of such liability.

First, the OCR Guidance is not a regulation nor is it an interpretation of regulations. *Smith*, 128 F.3d at 1033. Second, OCR's lack of analysis to support its conclusions counsels against adopting those conclusions. For example, OCR wholly fails to appreciate: (1) the statutory language of Title IX; (2) Title IX's Spending Clause origin; or (3) the differences between Title IX and Title VII. *See id.* (noting deficiencies in OCR analysis). It also makes no effort to determine the financial impact its policy would have on school districts receiving federal funds or the likelihood that those districts would simply forego federal funds, escape the conditions imposed by Title IX and, as a result, defeat Congress' purpose in enacting that statute.

Third, the "labyrinth of factors and caveats" contained in the OCR Guidance reinforces the conclusion that school boards were not put on notice that, by accepting federal funds, they would be liable to answer in damages for sexual harassment by a teacher even though the district had no knowledge of that harassment. *See Davis*, 120 F.3d at 1404 n.23 (OCR factors reinforce conclusion that board was not on notice of potential liability for student-student sexual harassment).

Finally, the Guidance cannot be given retroactive effect because this would constitute "surprising participating [school

districts] with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 17. Because the legitimacy of Spending Clause legislation depends on a recipient's acceptance of funds with full knowledge of the conditions and consequences, those conditions and consequences must be made known at the time the funds are accepted and not at some later date. *See id.* Contrary to Gebser's assertion that the Guidance merely restates the longstanding position of the Department of Education, it is actually that Department's first articulation of its position on an elementary or secondary school's liability in damages for sexual harassment of a student by a teacher. The OCR policy memorandum to which Gebser refers was addressed only to colleges and universities and predated this Court's recognition of a monetary remedy for violations of Title IX. *See* OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement & Policy Service to Regional Civil Rights Directors (Aug. 31, 1981).

Thus, even if this Court accepts the OCR Guidance as properly stating a school district's standard of liability under Title IX (which, of course, Lago Vista disputes), this standard cannot be applied in the present case because it was not articulated until years after the events here at issue occurred.

f. Gebser's varying theories of liability illustrate the lack of notice to school districts.

Gebser's history of advocating different theories of liability at different stages of this litigation illustrates that Congress did not unambiguously impose any standard of liability more onerous than actual knowledge. In the district court, Gebser alleged that Lago Vista was *strictly liable* under Title IX for Waldrop's wrongful conduct and was also liable for its failure to implement adequate procedures to guard against sexual harassment. (J.A. 15a.) In her motion for partial summary judgment, she explicitly rejected agency principles as supplying the standard of liability under Title IX: "A remedy requiring proof of agency or apparent agency is no remedy at all." (R. 335.) She also did not pursue her theory of liability

based on lack of an adequate grievance procedure. The district court specifically noted, "Plaintiff contends school districts are held strictly liable for the discrimination by their teachers in violation of Title IX." (R. 543; emphasis added.)

In framing the issue before the Fifth Circuit, Gebser asked only whether actual or constructive knowledge by school district officials is required by this Court's opinion in *Franklin v. Gwinnett County Indep. School Dist.*, 503 U.S. 60 (1992). Rather than pursuing her argument that the school district is strictly liable, she asserted that Lago Vista is liable because of the high degree of authority it granted to teachers over students, which authority aided Waldrop in engaging in his illicit relationship with her. In short, she asserted that Lago Vista's liability rests on the principles stated in section 219(2)(d) of the Restatement (Second) of Agency. The Fifth Circuit noted that Gebser was not pursuing a theory of liability based on constructive notice.[10] *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d at 1225. Gebser did not challenge this assessment of her position.

Now, in this Court, Gebser again proposes an agency theory of liability, resurrects her "inadequate grievance procedure" theory (which she has not urged since her second amended petition in the district court), and intimates that Lago Vista liability can be premised on its constructive knowledge of Waldrop's inappropriate remarks

10.

> Doe does not pursue the constructive notice theory because, as in *Leija*, there is not enough evidence for a jury to conclude that a Lago Vista school official should have known about the abuse. Doe did not present any evidence that any Lago Vista employee other than Waldrop knew of the relationship. School officials knew of complaints about Waldrop's tendency to make inappropriate remarks to students, but those complaints did not concern Doe and gave officials no reason to think that Waldrop would have sex with a student.

106 F.3d at 1225.

to other students, notwithstanding her abandonment of that contention at the Fifth Circuit. The very fact that Gebser has been unable to consistently identify and advocate a specific standard of liability (and the fact that the courts of appeals and district courts are so badly divided on this issue) simply highlights that school districts were not given adequate notice under Title IX of the circumstances under which they could be held liable for damages. In this situation, the appropriate standard is the only one that could reasonably have been anticipated in light of Title IX's Spending Clause origin and its connection to Title VI — actual knowledge.

2. Constructive knowledge.

Constructive knowledge is not an appropriate standard of liability for damages under Title IX because it is a negligence standard and, as discussed in detail above, monetary liability cannot be imposed under Title IX in the absence of an intentional violation by the recipient of the federal funds. *See Smith*, 128 F.3d at 1022 ("should have known" is negligence standard); *Rosa H.*, 106 F.3d at 656 (constructive notice is grounded in negligence).

For Title IX purposes, "a school district has not sexually harassed a student unless it *knows* of a danger of harassment and *chooses* not to alleviate that danger." *Rosa H.*, 106 F.3d at 659 (emphasis added). Constructive knowledge is not sufficient because a school district cannot "choose" any course of action (or inaction) and cannot *intentionally* commit, allow, condone, or even ignore sex discrimination based only on what it "should know." Such intentional choices can only be made based on what the district actually knows.

3. Reasonable avenue for complaint and redress.

Although she did not raise this theory in the Fifth Circuit, Gebser now contends that a school district should be held liable under Title IX if a teacher sexually harasses a student and the school district did not have in place a reasonable avenue for complaint

and redress. This proposal should be rejected because the failure to implement and/or publish a grievance procedure: (1) does not constitute discrimination based on sex; and (2) is a constructive notice/negligence concept that does not fulfill the requirement of an intentional violation. Further, the appropriate remedy for such a failure is injunctive relief mandating the implementation and publication of an appropriate grievance procedure, not the imposition of unlimited damage liability.

a. Lack of a grievance procedure is not discrimination based on sex.

Title IX prohibits discrimination "on the basis of sex" under federally funded education programs or activities. 20 U.S.C. § 1681(a) (1990). It is fundamental, then, that conduct that is alleged to violate this statute impact the complainant because of his or her gender. A policy, or lack of policy, that impacts males and females alike cannot be said to discriminate on the basis of sex. As noted by the Fifth Circuit, "sexual overtures directed at both sexes, or behavior equally offensive to both males and females, is not sex discrimination." *Rowinsky*, 80 F.3d at 1016.

The lack of an adequate procedure to report sexual harassment does not amount to discrimination on the basis of sex and, therefore, does not support imposing liability for a violation of Title IX. Only if a school district provides an avenue for complaint and redress to one gender and not the other can it be said that the district's inadequate procedures constitute discrimination based on sex. In such a case, the district would be liable under Title IX for its own intentional discrimination. But where the district is neglectful of all of its students, there is no discrimination and no violation of Title IX. As discussed above, this does not mean that school districts will intentionally fail to implement appropriate procedures; such deliberate indifference to the needs of its students would surely raise the possibility of § 1983 litigation.

b. Lack of a grievance procedure is negligence.

Even if the failure to implement and publish a grievance procedure can be considered sex discrimination, that discrimination would be the result of negligence rather than intent. *See Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994) (exonerating effect of remedial policy stems from negligence principles). For reasons stated above, school districts cannot be held liable in damages for a negligent violation of Title IX.

c. Title IX regulations do not support imposing monetary liability for a failure to implement or publish an appropriate grievance procedure.

Regulations adopted pursuant to Title IX require that a recipient of federal funds "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX]." 34 C.F.R. § 106.8(b). Each recipient is also required to notify students and parents that it does not discriminate on the basis of sex. 34 C.F.R. § 106.9(a). Nothing in the regulations informs school districts that they face potential monetary liability for a failure to comply with these procedural requirements. The more reasonable expectation is that a school district could be compelled to comply or, if its procedures remain deficient, risk the loss of federal financial assistance. *See Grove City College v. Bell*, 465 U.S. 555 (1984) (termination of federal funds for refusal to execute Assurance of Compliance). Because school districts were not given notice that their acceptance of federal funds could lead to monetary liability for procedural infractions, no such liability can be imposed.

d. Lago Vista had an appropriate grievance procedure in place but Gebser was determined not to report Waldrop's conduct.

Regardless of whether the failure to adopt and publish a grievance procedure can lead to monetary liability generally, it

cannot lead to liability against Lago Vista in the present case. First, Lago Vista did have an adequate grievance procedure in place. That procedure specifically directed any student or parent having a complaint alleging sexual harassment to request a conference with the principal or designee. (J.A. 46a.) The principal or designee was then required to hold a conference within five days and was responsible for coordinating an appropriate investigation. *Id.* The investigation was to be completed within ten days. *Id.* If the student was not satisfied with the outcome of the investigation, he or she had the right to institute an appeal. *Id.*

Gebser complains that this procedure is not sufficient because it was not brought to the students' attention. But she also emphasizes the prior incident in which Waldrop was accused of making inappropriate remarks in his classroom. In that instance, the students and their parents had no trouble invoking the appropriate procedure and the school principal had no hesitation in implementing that procedure. (J.A. 76a-80a.)

It is also apparent from the record that the reason Gebser did not attempt to register any complaint about Waldrop was not because she was unaware of any reasonable avenue of complaint or because she believed that the school district would tolerate Waldrop's behavior, but because she did not want to complain. Concerning Waldrop's use of sexual innuendo in his conversations with her, Gebser specifically stated that she did not report the conduct because she was not offended by it. (R. 350.) Even when the relationship escalated, she made a conscious choice not to report it. (R. 354-55.)

Gebser testified that she knew, on the very first occasion Waldrop initiated physical contact between the two, that his conduct was inappropriate. (J.A. 55a.) She also testified that she could have "set off sirens" by reporting Waldrop's conduct; that if she had reported the relationship to someone in authority at Lago Vista, the relationship would have ended immediately; and that she never believed that Lago Vista would tolerate such a teacher-student

relationship. (J.A. 62a-63a, 65a.) Most telling, Gebser testified that the reason she didn't report the relationship was because "obviously, I wouldn't be in his class anymore and I wouldn't have, I guess, sort of the intellectual companionship that I was getting with him." (J.A. 62a.)

Given Gebser's knowledge that the school district would act promptly to terminate her relationship with Waldrop and given her determination to hide that relationship so she could remain in Waldrop's classes, there is no causal link between Lago Vista's dissemination of its grievance procedure and any harm caused to Gebser by Waldrop. Even Gebser acknowledges that the purpose for requiring a grievance procedure is to convey to students that the school will not tolerate sexual harassment. Brief for Petitioners at 29. Gebser *knew* that the school district would not tolerate Waldrop's conduct but still she chose not to report it to anyone with the authority to stop it. In these circumstances, even if Lago Vista's grievance procedure is found to be deficient, the appropriate remedy is to issue an injunction mandating that the deficiency be corrected, not to compel the payment of damages for harm that would have occurred in any event. This solution inures to the benefit of all students rather than providing a monetary benefit to one student at the expense of the others.

B. Agency.

The second standard of liability proposed by Gebser would cause a school district to answer in damages if a teacher is aided in harassing a student by virtue of his agency relationship with the district. Applying this principle as envisioned by Gebser would effectively result in school districts being held strictly liable for all sexual harassment committed by a teacher against a student.

The genesis of Gebser's agency proposal is the *Franklin* Court's citation to *Meritor* and the Meritor Court's statement that "Congress wanted courts to look to agency principles for guidance" in defining employer liability under Title VII. *See Franklin*, 503 U.S. at 75;

Meritor, 477 U.S. at 72. For all the reasons discussed above, Title IX is not properly governed by Title VII principles. But even if it were, the *Meritor* Court warned that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 72. Courts must be even more wary of importing agency principles into Title IX because of its Spending Clause origin and the contractual nature of the statute.

Section 219(2)(d) of the Restatement (Second) of Agency, upon which Gebser relies, states:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2)(d) (1957).

Even as applied in Title VII cases,[11] this principle is not without limits. For example, in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995), the court of appeals discussed the application of section 219(2)(d) to a claim of hostile environment sexual harassment committed by a supervisor against an employee.

11. One esteemed judge has pointed out that the Court's statement in *Meritor* was not a ruling that Title VII incorporates the American Law Institute's *Restatement of Agency* and that Congress would have been "loopy" to have intended to incorporate the Restatement by reference. *Jansen*, 123 F.3d at 506, 508 (Posner, C.J., concurring and dissenting). Chief Judge Posner also noted that the Restatement predates even Title VII and was not written with the issue of sexual harassment in mind. *Id.* at 509-10.

The court noted that,

> [i]n a sense, a supervisor is always "aided in accomplishing the tort by the existence of the agency" because his responsibilities provide proximity to, and regular contact with, the victim,

but that "such a reading of section 219(2)(d) 'argue[s] too much.' " *Id.* at 1397; *see also Lago Vista*, 106 F.3d at 1226 (it is too broad a reading of § 219(2)(d) to hold employee aided in accomplishing tort in that he would not have been there but for job). It is apparent from the comments accompanying the Restatement that a narrower concept was intended — one that requires that the tort be accomplished by conduct associated with the agency status. *Id.*; *see also Smith*, 128 F.3d at 1029 (Restatement embraces narrow concept).

This narrow view of section 219(2)(d) is supported by the examples given in the accompanying comments:

> Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. . . . In other situations, the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position.

Restatement (Second) of Agency § 219 cmt. e (1957) (citation omitted).

In addition, comment (e) to section 219 refers to section 261, which is entitled, "Agent's Position Enables Him to Deceive."

Comment (a) to that section states that

> [l]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person *the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.*

Restatement (Second) of Agency § 261 cmt. a (1957) (emphasis added); *see also Gary*, 59 F.3d at 1397.

The mere fact that a teacher has access to students by virtue of his position as a teacher is not sufficient to impute liability to the school district under section 219(2)(d). As recognized by the Fifth Circuit, such a rule "would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student." *Rosa H.*, 106 F.3d at 655; accord *Lago Vista*, 106 F.3d at 1226; *see also Smith*, 128 F.3d at 1029 (section 219(2)(d) creates strict liability which cannot form basis for monetary award under Spending Clause legislation). Thus, proper application of section 219(2)(d) must be tempered by application of an additional principle of agency law — that a principal will not be bound by the conduct of the agent unless the belief in the agent's apparent authority is reasonable and the third person actually believes that the agent is authorized. *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 500 (7th Cir. 1997) (Flaum, J.), *cert. granted in part sub nom, Burlington Industries, Inc. v. Ellerth*, 66 U.S.L.W. 3283 (Jan. 23, 1998); *Gary*, 59 F.3d at 1398; *Bouton*, 29 F.3d at 109. In other words,

> [i]f a person has information which would lead a reasonable man to believe that the agent is violating orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability.

Gary, 59 F.3d at 1398 (quoting Restatement (Second) of Agency § 166 cmt. a).

This comports with the principle implicit in the comments to the Restatement — that being "aided by the agency relationship" requires more than merely furnishing proximity to the victim.[12]

In the present case, the record clearly reflects that Gebser did not believe that Waldrop was acting with any authority conferred on him by the school district. She readily acknowledged that she knew that her relationship with Waldrop was inappropriate, that if she reported it to school officials they would end the relationship immediately, and that she was never led to believe that the school district would tolerate such a relationship. (J.A. 55a-56a, 63a, 65a.) This knowledge negates the possibility that Gebser held any reasonable belief that Waldrop was acting with apparent authority.

The record also negates any inference that Gebser believed that Waldrop would use his position as a teacher to inflict adverse consequences on her if she refused his advances. Gebser states in her brief that her "only means of getting the educational programs she needed depended on the good graces of Waldrop." Brief for Petitioners at 4. There is absolutely no support in the evidence for this statement. The record is devoid of any indication that Waldrop conditioned Gebser's admission into his classes (or her grades or advancement) on her participation in sexual activities. There is also no evidence that Waldrop had the power to exclude Gebser from his classes or that Gebser believed he had any such power. In

12. This limitation on agency principles is recognized by the United States and the Equal Employment Opportunity Commission in their *amici* brief filed with this Court in *Faragher*. The government proposes in that brief that, to show that a supervisor was aided by his agency relationship, a plaintiff must show: (1) she feared adverse employment consequences if she resisted or complained; and (2) her fear was objectively reasonable. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner [Faragher] at 10, 21.

fact, there is no evidence that Waldrop was the only teacher at Lago Vista who was qualified to teach the advanced courses Gebser wanted to take. Thus, there is no evidence that, if Gebser had reported Waldrop and had him removed from his position, she would have been deprived of any of those courses. In sum, Gebser's concern was not that she would be excluded from Lago Vista's advanced placement program, but that she would be separated from Waldrop.

Gebser further states that she "submitted to Waldrop in order to retain her position as his student." Brief for Petitioners at 2. Again, the record does not support this statement. There is no evidence that Gebser carried on a sexual relationship with Waldrop because she feared that otherwise she could not be his student. Rather, the evidence is that she decided not to *report* the relationship so that she could remain his student. (J.A. 62a.) Her conduct was not motivated by any fear of retaliation by Waldrop, but by her knowledge that Waldrop would lose his job if the school district learned of his transgressions. (R. 355.) *Thus, she refused to report the relationship precisely because she knew that Lago Vista would act to protect her.* In these circumstances, it cannot be said that Waldrop was in any manner aided by his agency relationship with the school district.

C. Strict liability.

As recognized by the Fifth Circuit, Gebser's proposed application of agency principles would lead, in effect, to school districts being held strictly liable whenever a teacher sexually harasses a student. *See Lago Vista*, 106 F.3d at 1226; *Rosa H.*, 106 F.3d at 655. An argument could be raised in every case that the teacher's opportunity to take advantage of the student was enhanced by "the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children." *Rosa H.*, 106 F.3d at 655. But, for all the reasons discussed above, "strict liability is not part of the Title IX contract." *Canutillo*, 101 F.3d at 399. Further, there is no persuasive policy reason for holding

school districts strictly liable for criminal conduct committed by its teachers. *Id.*

Strict liability is imposed in the product liability context in part because manufacturers are better able to spread liability costs among consumers. *Leija*, 101 F.3d at 399. School districts do not have that same cost-spreading ability. *Id.* Strict liability is also appropriate in products cases because manufacturers are in a better position than consumers to discover defects in products. *Id.* This principle does not apply in the sexual harassment context.

> Human beings are inherently unpredictable, making it impossible for a school district to discover potential human 'defects' the way, for example, that a manufacturer, for its products, can design against defects, or inspect for them on an assembly line. In addition, the Constitution and state and federal law limit the extent to which a school district can examine, inquire about, or investigate its employees and their backgrounds and characteristics.

Leija, 101 F.3d at 399.

The Fifth Circuit is not the only court to recognize that strict liability is not an appropriate standard in the sexual harassment context. *See Jansen*, 123 F.3d 490 (rejecting strict liability in Title VII case involving sexual harassment of employee by supervisor). Judge Coffey, in his separate opinion in *Jansen*, noted that the policy reasons behind imposing strict liability in the products arena simply do not apply to employment discrimination based on sex. *Id.* at 544-46 (Coffey, J., concurring and dissenting). In addition to the differences noted by the Fifth Circuit (as quoted above), Judge Coffey also pointed out that the cost-benefit analysis that underlies strict liability does not exist in this setting because "obviously there is no gain to an employer when one of his supervisory employees engages in the sexual harassment of another employee." *Id.* at 544. Similarly, there is no gain to a school district when a teacher sexually harasses a student.

Because strict liability is not an appropriate standard of liability under Title IX, the Court should reject that standard and Gebser's proposed agency standard which, in effect, imposes strict liability in the context of teacher hostile environment sexual harassment of a student.

IV. THE STANDARDS OF LIABILITY PROPOSED BY GEBSER WOULD DEFEAT THE PURPOSE OF TITLE IX.

The two purposes of Title IX are: (1) to avoid using federal funds to support discriminatory practices; and (2) to provide individual citizens protection against those practices. *Cannon*, 441 U.S. at 704. Thus, Congress invoked its spending power to induce voluntary cooperation with a federal policy against discrimination based on sex. *Davis*, 120 F.3d at 1406 n.26; *see Rowinsky*, 80 F.3d at 1013 ("the value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds"). But if school districts decline federal funds, as they are entitled to do, the policy objectives underlying Title IX will remain unfulfilled. *Davis*, 120 F.3d at 1406 n.26; *Rowinsky*, 80 F.3d at 1013.

The possibility that school districts will forego federal funding rather than accept unlimited exposure to monetary liability for circumstances beyond their knowledge and control is not remote. As explained by the Eleventh Circuit in *Davis*:

> Prospective recipients will decline federal funding and current recipients will withdraw from federal programs if the cost of legislative conditions exceeds the amount of the disbursement. Federal funding represents only 7% of all revenues for public elementary and secondary schools in the United States. During the 1992-1993 school year,[13] for example, American schools received

13. Waldrop's physical relationship with Gebser began in 1992. (J.A. 55a.)

> $17,261,252,000 from the federal government out of a total budget of $247,626,168,000.
>
> School authorities must weigh the benefit of this relatively small amount of funding against not only the threat of substantial institutional and individual liability . . . but also the opportunity costs of devoting to litigation hours that might otherwise be spent running their schools. . . . Imposing the liability of the sort envisioned by appellant could induce school boards to simply reject federal funding—in contravention of the will of Congress.

120 F.3d at 1406 n.26.

"The imposition of liability beyond that which is likely to deter sexual harassment serves no constructive purpose. . . ." *Jansen*, 123 F.3d at 498 (Flaum, J.). In the employment context, such liability imposes unnecessary costs on employers, which costs are ultimately passed on to consumers. *Id.* In the school context, while some of these costs may be passed on to taxpayers by increasing school taxes, it is more likely that the children will bear the brunt of the costs in the form of fewer programs and lesser quality materials.[14] It is an unmistakable fact that school district money that is paid out in damage recoveries (or for increased insurance premiums) cannot be used to educate.[15]

14. This is a likely result whether the school district chooses to incur liability costs or whether it declines to accept federal assistance. In either event, the district will have fewer resources available to spend on its students.

15. It is ironic that the more money a school district must pay for incidents of sexual harassment, the less money it will have available to institute programs and policies to prevent or detect sexual harassment in the future.

The Court should also recognize the injurious effect Gebser's proposed standards would have on teacher-student relationships in general. It has been recognized that imposing strict liability under Title VII would bring about a fundamental reorientation of the employer-employee relationship and would have a chilling effect on interaction in the workplace. *See Jansen*, 123 F.3d at 540 (Coffey, J., concurring and dissenting). This chilling effect would be even more devastating in the schools because contact between teachers and students is so crucial to maintaining a proper educational environment. If school districts are to be held liable for teacher harassment regardless of the district's knowledge or fault, they will be forced to protect themselves by instructing teachers to keep their distance from the students. Any individual attention or assistance would necessarily be discouraged. In short, if liability is imposed simply because the school district affords teachers proximity to students, then liability will be avoided only by erecting barriers between teachers and students. This destruction of teacher-student association is surely not what Congress intended in enacting Title IX.

V. THE ONLY STANDARD BY WHICH LAGO VISTA COULD BE LIABLE IN THE PRESENT CASE IS STRICT LIABILITY.

For all the reasons stated above, the appropriate standard by which to determine a school district's liability under Title IX for a teacher's sexual harassment of a student is the actual knowledge standard articulated by the Fifth Circuit:

> [S]chool districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Lago Vista, 106 F.3d at 1226. In the present case, there is no

evidence that Lago Vista had actual knowledge of Waldrop's harassment of Gebser or of any substantial risk of such harassment.

Although Lago Vista urges the Court to adopt this standard of liability, it must point out that it is not liable under the facts of this case even if the Court adopts a lesser standard. There is no evidence that Lago Vista should have known of Waldrop's harassment of Gebser. The record shows that Gebser actively concealed the relationship from teachers, administrators, and fellow students alike (J.A. 62a-64a) and that no physical contact ever occurred on Lago Vista property (J.A. 59a). Waldrop's prior inappropriate (and somewhat ambiguous) remarks, which were directed at both male and female students, gave Lago Vista no reason to suspect that he might engage in illicit sexual conduct with a student. (J.A. 77a.) Thus, Lago Vista is not liable even if a constructive knowledge standard is imposed.

Similarly, Lago Vista is not liable under Gebser's agency theory because there is no evidence that she believed that Waldrop was authorized by the school district to engage in a sexual relationship with her or that any such belief would be reasonable. Gebser, herself, testified that she knew that the relationship was inappropriate and that the school district would not tolerate it. (J.A. 55a, 63a.) Waldrop obviously did not have actual authority to engage in the offending conduct and Gebser's knowledge that his conduct was beyond the bounds of an appropriate teacher-student relationship negates any inference of apparent authority. There is plainly no agency issue.

Lago Vista also cannot be held liable on the basis that it did not have a suitable grievance procedure available to students. It did have such a procedure and that procedure was easily invoked and properly followed by two other students who had been offended by Waldrop's remarks. Again, Gebser did not believe that Lago Vista would tolerate Waldrop's behavior nor is there any evidence that Waldrop ever threatened to lower her grades or remove her from his classes if she did not comply with his requests. Rather,

the evidence is that Gebser chose not to report Waldrop precisely because she *knew* that such a report would bring an end to the relationship. (J.A. 62a-63a.) No grievance procedure would have altered the course of this relationship.

The only standard that could result in liability in this case is strict liability, an extreme that is unavailable because of Title IX's language, history, and source. Adopting this extreme would also be unwise because it would leave a school district with two alternatives, neither of which is acceptable. It could: (1) choose to forego federal financial assistance, which would defeat the congressional purpose in enacting Title IX; or (2) accept federal financial assistance and risk devastating financial, emotional, and educational consequences for the district and its students. Congress cannot have intended such a choice; it cannot have intended to impose strict liability.

The proper disposition of the present case is clear. The Court should reject strict liability — the only standard under which Lago Vista could be liable to Gebser. The judgment of the court below can be affirmed on that basis alone. Even so, in light of the confusion in this area and Lago Vista's own need to determine whether it can afford to accept federal funds in the future, Lago Vista urges the Court to go further and to affirmatively adopt the actual knowledge standard articulated by the Fifth Circuit.

CONCLUSION

For the foregoing reasons, respondent Lago Vista Independent School District respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

WALLACE B. JEFFERSON
Counsel of Record
ELLEN B. MITCHELL
CROFTS, CALLAWAY
& JEFFERSON
A Professional Corporation
112 East Pecan Street
Suite 800
San Antonio, Texas 78205-1517
(210) 299-0279

N. MARK RALLS
ABELS, LOCKER, RALLS
& COHEN
1200 NationsBank Plaza
300 Convent Street
San Antonio, Texas 78205
(210) 224-9991

Attorneys for Respondent